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No. 90-1074

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WAYNE ESTELLE, Warden,

Petitioner,

vs.

MARK OWEN MCGUIRE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Is a state court's determination that evidence is relevant and admissible under state law binding on the federal habeas corpus court?

2. Would a federal rule requiring exclusion of evidence on grounds of relevance, despite its admissibility under state law, be a "new rule" within the meaning of *Teague* v. *Lane*, 489 U. S. 288 (1989)?

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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves the extended relitigation of a claim essentially based in state law and already fully and fairly litigated in the state courts. Such unnecessary relitigation is contrary to the rights of victims and society which CJLF was formed to advance.

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1. Both parties have consented in writing to the filing of this brief.

SUMMARY OF FACTS AND CASE

The facts are stated in the opinions below. See *McGuire* v. *Estelle*, 902 F. 2d 749 (CA9 1990); *McGuire* v. *Estelle*, 919 F. 2d 578 (CA9 1990) (Kozinski, J., dissenting from rejection of rehearing en banc). They are summarized here to frame the issues in this brief.

Tori McGuire died at the age of six months of massive internal injuries. 919 F. 2d, at 578-579. Medical testimony indicated that she had been beaten to death in the culmination of a pattern of abuse: the "Battered Child Syndrome." *Id.*, at 580.

While petitioner Mark McGuire and his wife Daisy McGuire were waiting at the hospital, Mrs. McGuire asked petitioner what had happened. He stated that he guessed the baby had fallen off the couch. Later when Mrs. McGuire stated that McGuire was responsible, he made no reply. *Id.*, at 583. McGuire repeated his "fell off the couch" story to the police. When they informed him that the medical evidence was inconsistent with that story, he said "maybe some Mexicans came in while I was upstairs." *Id.*, at 581.

Mrs. McGuire testified under transactional immunity, but testified that she was the one who had beaten the baby. 902 F. 2d, at 751-752. The testimony was both internally inconsistent and inconsistent with other evidence. 919 F. 2d, at 584. There was evidence that McGuire had previously assaulted his wife. Pet. Cert. A-64, A-65.

Defense counsel requested a jury instruction on involuntary manslaughter, stating "my contention is that whoever killed the baby or hit the baby had no malice, had no intent to kill the baby." The instruction was given. 919 F. 2d, at 581-582, n. 4.

The state appellate court affirmed in an unpublished opinion, holding that the evidence was relevant and admissible under state law. Pet. Cert. A-64 to A-66. The state supreme court denied discretionary review. The federal district court denied habeas corpus. 902 F. 2d, at 752.

The Court of Appeals reversed, finding a constitutional defect in the admission of evidence which it considered irrelevant, but which the state court had decided was relevant under state law. See 902 F. 2d, at 753-754.

SUMMARY OF ARGUMENT

The state court's resolution of the state law evidence question is correct. More importantly, however, that determination is binding on a federal court considering the case on habeas corpus.

Where no specific federal right is involved, there is no existing Supreme Court precedent to the effect that relevance of evidence is a federal question. Any rule to that effect would be a new rule, which may not be made on habeas corpus, with exceptions not applicable here.

ARGUMENT

I. The state court ruling is binding on the state law question.

A. The State Law Question.

In the subsequent sections of this part I, we will show that the state court ruling is binding and not open for reconsideration in federal court. To place the issue in perspective, however, we will describe the question and the California law on the point.

1. Admissibility.

Uncharged misconduct evidence is a complex subject worthy of an entire treatise. See, *e.g.*, E. Imwinkelried, *Uncharged*

Misconduct Evidence § 1.04 (1984).[2] The general rule, however, is simply stated. Under the "inclusionary" view adopted by the California Evidence Code, relevant evidence of uncharged misconduct is admissible unless its *only* relevance is to show defendant's character and to use that character to infer his conduct. *People* v. *Thompson*, 27 Cal. 3d 303, 317, 611 P. 2d 883 (1980); cf. Imwinkelried, § 2.30 (main vol. and 1990 Supp.) (federal rule in accord). If the evidence is relevant through *any* chain of logic not passing through the forbidden character link, it is not barred by the character evidence rule. *Ibid.*; Imwinkelried, § 2.31. It is still subject to discretionary exclusion if prejudice outweighs probative value, however. *Thompson*, at 318; Cal. Evid. Code § 352; cf. Fed. Rule Evid. 403.[3]

The general rule is that evidence is admissible if and only if it is relevant. Cal. Evid. Code §§ 350, 351. The definition of relevance is therefore critical. " 'Relevant evidence' means evidence . . . having *any* tendency in reason to prove or disprove any *disputed* fact that is of consequence to the determination of the action." § 210 (emphasis added). This definition is essentially the same as Fed. Rule Evid. 401 except for the requirement that the fact be disputed. The omission of that requirement from the federal rule is intentional. See Advisory Committee Note to Fed. Rule Evid. 401; 22 C. Wright & K. Graham, *Federal Practice and Procedure* § 5164, at 43-47 (1978).

Uncharged misconduct evidence, like other prosecution evidence in c..ninal cases, is used for four purposes: (1) to establish that the criminal act was committed; (2) to establish that the defendant committed it; (3) to establish that he had the mental state making that act a crime; and (4) to disprove

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2. Cited below as "Imwinkelried."

3. Parallel federal rules are cited in this part as a convenient shorthand for familiar principles. The citations are not meant to imply that California is obligated to conform.

affirmative defenses raised by the defendant. See Imwinkelried, *supra* note 2, § 3.01, at 3. Evidence is relevant if it has *any* tendency in reason to prove or disprove any of these facts which may be "disputed."

Although the Evidence Code applies to both civil and criminal cases, Cal. Evid. Code §§ 12, 105, procedural differences between the two types of cases have a strong effect on what is "disputed." A civil defendant files an answer which admits any material allegation not denied. Cal. Code Civ. Proc. § 431.20. The plaintiff can further require affirmative admissions or denials by serving requests for admission. *Id.*, § 2033. Criminal cases have neither of these winnowing procedures. A defendant who pleads not guilty "puts in issue every material allegation of the accusatory pleading. . . . " Cal. Pen. Code § 1019.

> "There is no merit in the contention of defendant that until he puts in issue either identity, intent or other fact the People may not anticipate this and present evidence of other acts in their case in chief. It is not necessary for the defendant to raise issues before the People may meet them where this is part of the prosecution's burden. The People have the burden of establishing intent and identity." *People* v. *Archerd*, 3 Cal. 3d 615, 639, 477 P. 2d 421 (1970).

American courts are divided over whether a defendant can avoid the introduction of uncharged misconduct evidence by not disputing the fact in question. See Imwinkelried, *supra* note 2, § 8.10, at 22. Courts are further divided on what the defendant needs to do to remove a fact from dispute.

Imwinkelried identifies a spectrum of five situations ranging from the strongest case for excluding the evidence to the weakest. *Id.*, § 8.10, at 23. In the first situation, the defense expressly offers to stipulate to the fact which the evidence is offered to prove. While some courts do not require the prosecution to accept the stipulation in lieu of the evidence, 22 Wright & Graham, *supra*, § 5194, at 198-199, the majority do. Imwinkelried, § 8.11, at 25-26. California is in the majority.

People v. *Hall*, 28 Cal. 3d 143, 152, 616 P. 2d 826 (1980).[4]

The second situation is where the defendant testifies and expressly admits the fact but does not enter into a formal stipulation. Imwinkelried, *supra* note 2, § 8.12, at 28-29. In most cases it would seem to be splitting hairs to distinguish this case from the first. Thus in *People* v. *Tassel*, 36 Cal. 3d 77, 679 P. 2d 1 (1984), a defendant on trial for rape removed identity from dispute by testifying, admitting identity and intercourse, and claiming consent. *Id.*, at 81-82, 88-89. The essential question is whether the stipulation or testimony gives the prosecution everything it could legitimately have sought to obtain by introducing the evidence. If not, the prosecution can still introduce its evidence. See, *e.g.*, *People* v. *Edelbacher*, 47 Cal. 3d 983, 1007, 766 P. 2d 1 (1989) (inadequate offer to stipulate); *Hall*, *supra*, 28 Cal. 3d, at 152-153.

The third situation is where the defendant offers no evidence one way or the other on the issue. Imwinkelried, § 8.13, at 30. Under *Archerd* and *Hall*, California does not recognize mere passivity as removing the issue from dispute. At least one respected commentator agrees. See 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 404[09], at 404-64 (1990) (criticizing a contrary federal evidence case).

To raise the contrary view in this situation to a constitutional mandate would be an absurd contradiction. The defendant has a constitutional right to sit back and require the prosecution to prove every element beyond a reasonable doubt. See *In re Winship*, 397 U. S. 358, 364 (1970). The state is forbidden to allow the prosecution the benefit of a presumption in carrying that burden, *Sandstrom* v. *Montana*, 442 U. S. 510, 524 (1979), even if the presumption is deeply rooted in both common sense and common law. Compare *Sandstrom*, at 513 with *Agnew* v. *United States*, 165 U. S. 36, 49-50 (1897).

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4. There is now an exception, not pertinent here, where a prior felony conviction is an element of the new offense. Cal. Const. art. I, § 28(f).

To declare a constitutional rule that lack of an express denial removes an issue from dispute would be to overrule *Winship* and *Sandstrom*. California is well within constitutional bounds in refusing to consider an issue undisputed in Imwinkelried's third situation. This same conclusion necessarily follows for his fourth and fifth situations, which are even weaker cases for the defense.

With this foundation, we can examine the relevance of the "battered child syndrome." The first reported California case admitting evidence of the syndrome is *People* v. *Jackson*, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (1971), a case quite similar to the present case. As in this case, Jackson was accused of beating his child. *Id.*, at 505-506.[5] "The defense was a denial on the part of the defendant that he had beaten the child and an effort to cast suspicion on the child's maternal grandmother and maternal aunt who took care of the child from time to time." *Id.*, at 508. The *Jackson* court had this to say about the syndrome:

> "A finding, as in this case, of the 'battered child syndrome' is not an opinion by the doctor as to whether any particular person has done anything, but, as this doctor indicated, 'it would take thousands of children to have the severity and number and degree of injuries that this child had over the span of time that we had' by accidental means. In other words, the 'battered child syndrome' simply indicates that a child found with the type of injuries outlined above has not suffered those injuries by accidental means. This conclusion is based upon an extensive study of the subject by medical science. *The additional finding that the injuries were probably occasioned by someone who is ostensibly caring for the child is simply a conclusion based upon logic and reason*. Only someone regularly 'caring' for the child has the continuing opportunity to inflict these

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5. Fortunately for the child, there was one important difference: he survived.

types of injuries; an isolated contact with a vicious stranger would not result in this pattern of successive injuries stretching through several months." *Id.*, at 507 (emphasis added).

Remembering that evidence is relevant if it makes *any* change at all in the probability that a disputed fact is true,[6] the battered child syndrome is therefore relevant to three facts the prosecution must prove in its case in chief. First, it increases the probability that the child died at the hands of another and not by falling off the couch, etc. Second, it tends to establish that the batterer committed the crime with the *mens rea* of malice aforethought. That is, he did not act in the heat of sudden passion, see Cal. Pen. Code § 192(a) (voluntary manslaughter), or unintentionally cause death in the commission of misdemeanor child abuse, see *id.* § 192(b) (involuntary manslaughter); *id.*, § 273a (child abuse).

Third, and most importantly, the syndrome evidence has a tendency to narrow the class of suspects. Without this evidence, the suspects include the entire world. Even McGuire's bigoted lie that "maybe some Mexicans came in while I was upstairs," *McGuire* v. *Estelle*, 902 F. 2d 749, 751 (CA9 1990), is not entirely impossible. If an item of evidence narrows the class of suspects from the entire world to the small class of "caretakers,"[7] then the probability that any one member of that class is the culprit is greater than the probability would have been without that item.

Imwinkelried categorizes this kind of evidence as "possession of capacity suited to the commission of the charged crime." Imwinkelried, *supra* note 2, § 3.03, at 5. "This theory is widely recognized in the case law." *Ibid.*

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6. "A brick is not a wall." C. McCormick, *Evidence* § 185, at 543 (Cleary 3d ed. 1984).

7. Like the *Jackson* court, we use the admittedly inappropriate term "care" for lack of a better one.

"The theory of logical relevance is straightforward. If the issue is the defendant's identity, under Federal Rule of Evidence 401[8] any evidence slightly increasing the probability of the defendant's identity is material. At the outset of the case, there is a zero probability. By establishing the defendant's possession of a capacity suited for the commission of the crime, we slightly increase the likelihood of the defendant's identity. Some persons may not possess that capacity, and by distinguishing the defendant from those persons, the prosecutor raises the probability of the defendant's identity and guilt. To trigger this theory, the capacity cannot be one shared by the entire population. The ability must serve to discriminate between the defendant and other persons who might have committed the crime." *Id.*, at 5-6 (footnotes omitted).

The "capacity" in this case is regular access to the child. See *Jackson*, *supra*, 18 Cal. App. 3d, at 507.[9] This conclusion is a direct logical inference of probability, without passing through the forbidden inference of conduct from character. See generally Imwinkelried, *supra* note 2, §§ 2.18-2.20, at 47-54.

Under *People* v. *Hall*, *supra*, and *People* v. *Edelbacher*, *supra*, defendant could have eliminated the relevance under the above theory only by stipulating to *everything* the prosecution could legitimately seek to establish by the evidence. He would have to stipulate that (1) Tori died by force and not by accident; (2) the person who killed Tori did so with malice aforethought and not any lesser mental state; and (3) the person who killed Tori was a member of the household, *i.e.*, either McGuire or his wife. Nothing less will serve to make the evidence irrelevant under section 210. No such stipulation was offered, and in fact defendant requested and received man-

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8. Or under Cal. Evid. Code § 210. See *supra* p. 4.

9. Quoted *supra* pp. 7-8.

slaughter instructions. See *McGuire* v. *Estelle*, 919 F. 2d 578, 581-582, n. 4 (CA9 1990) (Kozinski, J., dissenting from rejection of rehearing en banc).

2. Jury instruction.

The Court of Appeals found that the Fourteenth Amendment prohibited the giving of this instruction in this state criminal case:

> "Evidence has been introduced for the purpose of showing that the defendant committed acts similar to those constituting a crime other than that for which he is on trial. Such evidence, *if believed*, was not received, and may not be considered by you to prove that he is a person of bad character or that he had a disposition to commit crimes. Such evidence was received and may be considered by you *only* for the *limited* purpose of determining *if* it tends to show three things:
>
> "1. The impeachment of Daisy McGuire's testimony that she had no cause to be afraid of the defendant,
>
> "2. To establish the battered child syndrome, and
>
> "3. Also a connection between the other two offense (sic) and the one of which the defendant is accused so that it may be logically concluded that *if* the defendant committed other offenses, he also committed the crime charged in the case. *You are not permitted to consider [the] evidence for any other purpose*." 902 F. 2d, at 754-755 (emphasis altered).

The language of paragraph 3 is taken directly from California case law, where it has a long history.[10] The language goes back at least 79 years. "It is held by all the authorities that, whenever there is a clear connection between two offenses, from which it may be logically inferred that, if guilty of one, the defendant is also guilty of the other, evidence of such other offense is admissible." *People* v. *Burke*, 18 Cal. App. 72, 98 (1912).

This long line of cases was approved in *People* v. *Cramer*, 67 Cal. 2d 126, 130, 429 P. 2d 582 (1967). *Cramer* itself was later disapproved only to the extent that it authorized prior misconduct evidence to prove a point not in dispute. See *Tassell*, *supra*, 36 Cal. 3d, at 89, n. 8. The portion of the instruction in question here involves use of the evidence to prove identity, and identity is very much in dispute in this case.

The jury was not told that the prior acts proved McGuire committed the present offense. They were told that the evidence was submitted to them in order for *them* to determine whether that inference could be drawn. They were not told that McGuire committed the prior acts; the instruction qualified the submission with the words "if believed."

California cases have found particularly strong probative value in prior crimes against the same victim. They have held that such evidence is admissible to show identity and is not prohibited by the state's character evidence rule. See, *e.g.*, *People* v. *Zack*, 184 Cal. App. 3d 409, 413-415, 229 Cal. Rptr. 317 (1986). As noted earlier, battered child syndrome is strong evidence that Tori died as part of a continuing pattern of abuse. The jury was correctly instructed that *if* they believed McGuire was the abuser, they could consider that evidence as tending to show that he was also the perpetrator of

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10. Whether the instruction is a "misreading" of CALJIC 2.50, see 902 F. 2d, at 755, n. 2, is immaterial. CALJIC is neither a statute nor a rule of court, but only a recommendation of a committee of the Superior Court of one county. See 1 *Cal. Jury Instructions — Criminal* vii-ix (5th ed. 1988).

the present offense. The instruction was phrased in accordance with California law.

But was there enough evidence linking defendant to the prior acts to instruct the jury on that theory? Identity of the defendant as the actor in the prior act is a preliminary fact for determination by the jury. Cal. Evid. Code § 403; see *People* v. *Simon*, 184 Cal. App. 3d 125, 131, 228 Cal. Rptr. 855 (1986); cf. *Huddleston* v. *United States*, 485 U. S. 681, 689-690 (1988). The trial judge need only determine if the evidence was sufficient to sustain a jury finding of proof by a preponderance of the evidence. *Simon*, 184 Cal. App. 3d, at 134; cf. *Huddleston*, 485 U. S., at 690.

The battered child syndrome by itself raises the probability that McGuire was the batterer to very nearly fifty percent, because only two people were "taking care" of Tori. 919 F. 2d, at 584, n. 7 (Kozinski, J., dissenting). When McGuire's habit of rough treatment, *ibid.*,[11] Mrs. McGuire's habit of gentle treatment, *ibid.*, and the patent falsity of Mrs. McGuire's immunized "confession," *id.*, at 584, are added, the evidence is more than sufficient to go to the jury.

Amicus does not submit the foregoing analysis as absolutely conclusive of the state law question. An argument can be made for the other side. We submit this analysis to demonstrate that the relevance and instruction issues are "susceptible to debate among reasonable minds." Cf. *Butler* v. *McKellar*, 108 L. Ed. 2d 347, 356, 110 S. Ct. 1212, 1217 (1990).

The state court decision of the question is a different matter. "Until reading the panel's opinion, I had thought the federal courts were bound by state court interpretations of the state rules of evidence." 919 F. 2d, at 580 (Kozinski, J., dissenting). Indeed they are.

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11. Unlike character, habit is admissible to show conduct. Cal. Evid. Code § 1105, cf. Fed. Rule Evid. 406.

B. Previously Decided State Questions.

Frequently, questions of federal law are related to questions of state law. The resolution of one may depend on the other, or the resolution of one may make resolution of the other unnecessary.

A long, stormy battle has swirled around the question of when a state *procedural* rule may preclude a decision on the merits of a federal question. A complex body of law has developed concerning when such a bar is "independent," see *Ake* v. *Oklahoma*, 470 U. S. 68, 75 (1985), when it is "adequate," compare *Johnson* v. *Mississippi*, 486 U. S. 578, 587 (1988) with *Dugger* v. *Adams*, 489 U. S. 401, 410-412, n. 6 (1989), and when the federal court may reach the merits despite an adequate and independent state procedural bar, see *Brown* v. *Allen*, 344 U. S. 443, 486-487 (1953) (absolute bar); *Fay* v. *Noia*, 372 U. S. 391, 438 (1963) ("deliberate bypass" only); *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977) (cause and prejudice); *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986) (actual innocence).

By comparison to these stormy waters, the doctrine regarding prior state decisions of *substantive* law has been a pool of serenity. The state court decision is simply not reviewable on such questions. See *Henry* v. *Mississippi*, 379 U. S. 443, 446-447 (1965) (distinguishing procedural from substantive questions).

> "As to the role of adequate and independent state grounds, it is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is *immune* from review in the federal courts. *Fox Film Corp.* v. *Muller*, 296 U. S. 207 (1935); *Murdock* v. *Memphis*, 20 Wall [87 U. S.] 590 (1875). The application of this principle in the context of a federal habeas proceeding has therefore excluded from consideration any questions of state *substantive* law, and thus effectively barred federal habeas review where questions of that sort are either the only ones raised by a petitioner *or are in themselves dispositive of his case*." *Sykes*, *supra*, 433 U. S., at 81 (emphasis

added in part).

Dugger v. *Adams*, 489 U. S. 401 (1989) is an example of a federal question which is dependent on a state question. After Adams' trial and appeal, *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985) "held that remarks by a prosecutor in a capital case that misinformed the jury as to the role of appellate review violated the Eighth Amendment." *Adams*, 489 U. S., at 405.

Adams challenged, as *Caldwell* error, statements made by the trial judge regarding the roles of the judge and jury in the Florida sentencing procedure. *Ibid.* He had not objected at trial, however, and the state courts held the claim to be barred. *Ibid.*

In reversing the grant of federal habeas corpus, *Adams* noted a "critical fact" about *Caldwell* error. *Caldwell* only applies if the comments are, in fact, an incorrect statement of *state* law. A federal habeas court cannot decide the federal question without first answering a state question. If the comments were accurate, there is no federal question. See *id.*, at 407-408.

Discussing the lack of cause, the *Adams* Court said this:

> "Had respondent objected at the time and asserted error under state law, and had the trial or appellate court sustained his objection, the error would have been corrected in the state system. Had his objection been overruled and that ruling sustained on appeal, *we would very likely know* that the instruction was an accurate reflection of state law. In either event, it is doubtful that the later decision in *Caldwell* would have provoked the filing of a second habeas corpus petition." *Id.*, at 408 (emphasis added).

This passage strongly implies that the state court ruling on the question would be absolutely binding on the federal habeas court. The federal courts would *know* the answer to the state question, not merely have guidance on it. It would be so clear that Adams' lawyer would probably not even include the

claim in the second petition.

In the dawn of our republic, one of Congress' first acts was to command the new federal courts to respect the outcome of state court proceedings. Act of May 26, 1790, ch. 11, 1 Stat. 122. This command is now codified, essentially unchanged, in 28 U. S. C. § 1738, para. 3: "[J]udicial proceedings [of a State] . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."

Little has been said about this act in relation to habeas corpus. In the early days the writ was only available for jurisdictional attacks, *Ex parte Royall*, 117 U. S. 241, 248 (1886), and the general rule of nineteenth century procedure was that subject matter jurisdiction could always be collaterally attacked on habeas corpus. See R. Hurd, *Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus* 327-330 (2d ed. 1876). A federal court entertaining jurisdictional attack via habeas corpus was therefore giving the state judgment no less finality than the state's own courts would have given it.

Exceptions to the Full Faith and Credit Act "will not be recognized unless a later statute contains an express or implied repeal." *Kremer* v. *Chemical Construction Corp.*, 456 U. S. 461, 468 (1982). Implied repeals " 'are not favored' " and will be found only when " 'the intention of the legislature to repeal [is] clear and manifest.' " *Ibid.* (quoting *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 154 (1976)).

Justice Frankfurter asserted in his concurring opinion in *Brown* v. *Allen*, 344 U. S. 443, 507-508 (1953) that Congress had commanded the federal habeas courts to review *de novo* questions of *federal* law which had already been considered by the state courts. This is a conclusion, in effect, that Congress partially repealed the Full Faith and Credit Act in the habeas corpus statute. This dubious proposition has been accepted ever since, see *Wainwright* v. *Sykes*, *supra*, 433 U. S., at 87, with one exception, see *Stone* v. *Powell*, 428 U. S. 465 (1976), and the present case is not an appropriate occasion to challenge it. See *Duckworth* v. *Eagan*, 106 L. Ed. 2d 166, 176, n. 3, 109

S. Ct. 2875, 2879, n. 3 (1989) (expansion of *Stone* not raised by parties). Nothing in *Brown* or any of the cases which followed it, however, suggests that the habeas statute in any way detracts from the respect due to the state court decision on questions of *state* law. *Sykes* and *Adams*, while not mentioning the Act, say just the opposite.

In California, when an evidentiary question has been resolved on appeal, that decision is final and cannot be relitigated on habeas corpus, even if the question is a constitutional one. See *In re Eli*, 71 Cal. 2d 214, 219, 454 P. 2d 337 (1969). Only questions going to the power of the court to impose the sentence can be relitigated on habeas corpus. See *In re Harris*, 49 Cal. 3d 131, 134, n. 2, 775 P. 2d 1057 (1989) (sentence greater than maximum on undisputed facts). The present case involves no such issue. The state judgment on the state question is final. The evidence in question is "relevant" within the meaning of section 210 of the California Evidence Code, and it is not excludable under the state's character evidence rule.

C. The Federal Questions.

The federal questions must be shaped by this binding determination of *state* law. The questions are these. *Given* that the evidence is relevant under *state* law, and *given* that it is not excluded by the *state's* character evidence rule: (1) Is exclusion nonetheless required by the Constitution of the United States? (2) Did the jury instruction violate some federal constitutional right? If neither, habeas does not lie. See *Engle* v. *Isaac*, 456 U. S. 107, 121, n. 21 (1982).

Two possible theories are suggested by the Court of Appeals' opinion. First, the court seems to imply that there is a federal constitutional standard of relevance superimposed on top of state law which prohibits introduction of evidence

deemed relevant under state law. 902 F. 2d, at 753-754.[12] Second, the court implicitly suggests that there is a federal constitutional rule regarding how juries may be instructed to use uncharged misconduct evidence. 902 F. 2d, at 754-755.

Because this is a federal habeas corpus case, a threshold question precedes these questions. Are either of these asserted rules "new rules" within the meaning of *Teague* v. *Lane*, 489 U. S. 288 (1989)?[13] If so, the writ does not lie. A rule is "new" even though it merely raises to federal constitutional stature a previously established rule of state law. "Federal habeas corpus serves to ensure that state convictions comport with *federal* law that was established at the time the petitioner's conviction became final." *Sawyer* v. *Smith*, 111 L. Ed. 2d 193, 209-210, 110 S. Ct. 2822, 2830 (1990) (emphasis in original).

When is a new federal rule "established"? The *Teague* cases have never said explicitly, but they have said implicitly. We will return to this question in part III. First, we will survey existing authority on the federal questions stated above.

II. There is no existing Supreme Court precedent to support either of the Court of Appeals' theories.

A. A Federal Standard of Relevance.

Part II. A. of the opinion below finds a federal constitutional violation in the admission of supposedly irrelevant evidence, without citing a single Supreme Court case. 902 F. 2d,

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12. The court was actually proceeding on the assumption that the evidence was *not* relevant under state law. See 919 F. 2d, at 580 (Kozinski, J., dissenting from denial of rehearing). As we have already shown, that question is not on the table.

13. This Court has previously considered *Teague* questions *sua sponte*. See *Penry* v. *Lynaugh*, 106 L. Ed. 2d 256, 298, 109 S. Ct. 2934, 2963 (Stevens, J., concurring and dissenting).

at 753-754. The relevant portion of McGuire's brief in opposition to certiorari, Opp. Pet. Cert. 9-12, cites only cases of marginal relevance plus an out-of-context quote from *Cupp* v. *Naughten*, 414 U. S. 141, 147 (1973). Amicus' own research has found only a few cases, and they point uniformly against the Court of Appeals' conclusion.

Lisenba v. *California*, 314 U. S. 219 (1941) involved claims of irrelevant and prejudicial evidence. It appears that this Court granted certiorari in *Lisenba* primarily to address the genuine federal question of the voluntariness of his confession. That issue comprises the bulk of the opinion, *id.*, at 229-241, and the entire dissent, *id.*, at 241-243 (Black, J.). The majority refers to the confession issue as "the important question" in the singular. *Id.*, at 229. Nonetheless, the *Lisenba* Court did address the other issues. The alternative of granting certiorari limited to the confession question was apparently impractical due to the confused state of Lisenba's *in forma pauperis* "appeal." See *id.*, at 222-223. The Court's terse disposition of those other issues is enlightening.

Lisenba, alias James, was accused of murdering his wife for the insurance money. *Id.*, at 223-224. His contention that the state court had misapplied its accomplice corroboration rule "need[ed] but brief notice." *Id.*, at 227. "The Fourteenth Amendment does not forbid a state court to construe and apply its laws with respect to the evidence of an accomplice." *Ibid.*

The next contention was strongly similar to McGuire's contention in the present case. It seems that defendant's previous wife also died under suspicious circumstances. Evidence of the circumstances of that death was admitted, even though there was no proof that defendant had killed her. *Id.*, at 225, 227. The evidentiary question was the subject of a long analysis by the state supreme court. See *People* v. *Lisenba*, 14 Cal. 2d 403, 424-432, 94 P. 2d 569 (1939). The United States Supreme Court's *entire* discussion of the question was this:

> "Third. Testimony was admitted concerning the death of James' former wife, on the widely recognized prin-

> ciple that similar but disconnected acts may be shown to establish intent, design, and system.[9] *The Fourteenth Amendment leaves California free to adopt a rule of relevance which the court below holds was applied here in accordance with the State's law.*

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[9] See 2 Wigmore, *Evidence*, 3d ed. § 363."

314 U. S., at 227-228 (emphasis added).

Lisenba also addressed the question of whether there is a federal standard of exclusion of prejudicial evidence. The prosecution had brought live rattlesnakes into the courtroom as part of its evidence of the bizarre conspiracy. Once again, the Court emphasized the difference between rules of evidence and the Due Process Clause.

> "We do not sit to review state court action on questions of the propriety of the trial judge's action in the admission of evidence. We cannot hold, as petitioner urges, that the introduction and identification of the snakes so infused the trial with unfairness as to deny due process of law. The fact that evidence admitted as relevant by a court is shocking to the sensibilities of those in the courtroom cannot, for that reason alone, render its reception a violation of due process." *Id.*, 228-229.

Lisenba is therefore strong authority for two propositions. First, when evidence of prior misconduct is deemed relevant and admissible under state law, there is no federal rule for second-guessing that decision under the rubric of due process. Second, when evidence is relevant, there is no federal rule requiring its exclusion on the ground that it is inflammatory.

The next major case dealing with prior misconduct is *Spencer* v. *Texas*, 385 U. S. 554 (1967). At the time of Spencer's trial, Texas courts tried habitual criminal allegations together with the guilt determination. The jury was thus aware of the

irrelevant prior crime but was told to disregard it. *Id.*, at 555-556.

Spencer rejected the assertion that this procedure violated the Due Process Clause. Justice Harlan, writing for the majority, specifically rejected the idea that the due process cases "establish this Court as a rulemaking organ for the promulgation of state rules of criminal procedure." *Id.*, at 564. "As Mr. Justice Cardozo had occasion to remark, a state rule of law 'does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar.' *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 [1934]." *Ibid.*

Spencer's discussion distinguishing *Jackson* v. *Denno*, 378 U. S. 368 (1964) is particularly significant. *Jackson* involved procedures to guarantee a specific federal constitutional right: the privilege against self-incrimination. Federal procedural requirements were imposed to implement that specific federal right. *Spencer*, at 564-565. "In the procedures before us, in contrast, no specific federal right . . . is involved; reliance is placed solely on a general 'fairness' approach. In this area the Court has always moved with caution before striking down state procedures." *Id.*, at 565.

> "It would be a wholly unjustifiable encroachment by this Court upon the constitutional power of States to promulgate their own rules of evidence to try their own state-created crimes in their own state courts, so long as their rules are not prohibited by any provision of the United States Constitution, which these rules are not." *Id.*, at 568-569.

Justice Stewart echoed a similar consideration in his concurrence. He emphasized that the Constitution did not give him "a roving commission to impose upon the criminal courts of Texas [his] own notions of enlightened policy." *Id.*, at 569. The fact that a federal judge may disagree with a procedure or the fact that federal courts may follow a different one is not sufficient to render it unconstitutional.

Burgett v. *Texas*, 389 U. S. 109 (1967) strongly restated the distinction between specific federal rights and the "general 'fairness' approach." One of the prior convictions in *Burgett* had been entered in a case where the defendant was not represented by counsel. *Id.*, at 112.[14] *Burgett* relied expressly on the holding of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) that the specific Sixth Amendment right to counsel was incorporated into the Fourteenth Amendment. 389 U. S., at 114. The *Burgett* Court quoted *Spencer* and distinguished it on this ground. *Id.*, at 115-116.

Most recently, this Court reaffirmed the principle of *Spencer* in *Marshall* v. *Lonberger*, 459 U. S. 422 (1983). "Central to our decision [in *Spencer*] was the fact that the Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules." *Id.*, at 438, n. 6.

B. Instruction on the Use of the Evidence.

The other federal question which the Court of Appeals purported to find in this case was the manner in which the jury was instructed to consider the evidence. 902 F. 2d, at 754-755. The antecedent *Teague* question is whether there is any Supreme Court precedent to support the notion that this is a federal constitutional question. The negative answer cannot be conclusively proven; we can only report that we have sought and we have not found. Cf. *Matthew* 7:7.

There is no shortage of Supreme Court cases scrutinizing jury instructions, to be sure. When an instruction is claimed to infringe a specific, identified federal right, the phrasing of the instruction is a federal question. A federal right regarding the burden of proof was identified in *In re Winship*, 397 U. S. 358 (1970). Consequently, a long line of cases from *Ulster County Court* v. *Allen*, 442 U. S. 140 (1979) to *Yates* v. *Evatt*, pending

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14. The record of the prior conviction was somewhat ambiguous, *ibid.*, but the Court treated it as an uncounseled conviction. *Id.*, at 114-115.

case No. 89-7691, has examined burden-shifting instructions as a federal question. Similarly, the case law of capital punishment under *Furman* v. *Georgia*, 408 U. S. 238 (1972) and its progeny has made capital sentencing standards a federal question, with a resulting deluge of instruction cases. See, *e.g.*, *Boyde* v. *California*, 108 L. Ed. 2d 316, 327, 110 S. Ct. 1190, 1196 (1990). Where a federal rule of exclusion forbids consideration of the evidence for some purposes but not others, the jury instruction would be a key element in deciding the federal question of whether the use was properly limited. See, *e.g.*, *Oregon* v. *Hass*, 420 U. S. 714, 717 (1975) (impeachment with statement excluded under *Miranda*).

The present question is a horse of an entirely different color. The instruction in question dealt with the manner in which the jury was instructed to use the evidence after the judge found it admissible under state law. "Misuse" of the evidence by the jury would not infringe any specific federal right. We have found no Supreme Court case, and McGuire cites none, which renders such a question a federal question under a "general 'fairness' approach." *Cf. Burgett*, *supra*, 389 U. S., at 115.

C. Cases Cited by Respondent.

McGuire's Brief in Opposition to the Petition for Certiorari cites only two Supreme Court cases to support the notion that this case involves a due process issue. See Opp. Pet. Cert. 12, citing *Cupp* v. *Naughten*, 414 U. S. 141, 147 (1973); Opp. Pet. Cert. 13, citing *United States* v. *Lovasco*, 431 U. S. 783, 790 (1977). Both cases actually support the opposite conclusion.

Lovasco rejected an assertion that delay in prosecution was a violation of the Due Process Clause even though two material witnesses had died in the interim. *Id.*, at 785-786, 796-797. The phrase cited by McGuire, "fundamental conceptions of justice which lie at the base of our civil and political institutions," occurs in a passage explaining that the delay in *Lovasco* was *not* fundamental. *Id.*, at 790. The phrase is taken from *Mooney* v. *Holohan*, 294 U. S. 103, 112 (1935), where the

alleged due process violation was the use of perjured testimony *known* by the prosecution to be perjured at the time it was introduced. Neither the delay in *Lovasco* nor the evidence in this case comes close to such a blatant fraud on the judicial process.

Both the Court of Appeals and McGuire quote *Cupp* v. *Naughten*, 414 U. S. 141, 147 (1973) out of context for the proposition that a federal constitutional violation occurs when an error "so infected the entire trial that the resulting conviction violates due process." See *McGuire*, *supra*, 902 F. 2d, at 755; Opp. Pet. Cert. 12. Misused in this manner, *Naughten* is asserted as authority for precisely the "roving commission" disclaimed by Justice Stewart in *Spencer*. See *supra* p. 20. *Naughten* holds nothing of the sort.

Naughten involved a claim along the lines of what would later be called "*Sandstrom* error." See *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). The jury had been instructed that witnesses were rebuttably presumed to tell the truth. 414 U. S., at 142. Naughten's contention was that a presumption of truthfulness of prosecution witnesses shifted the burden of proof to him. *Id.*, at 144.

The *Naughten* Court began by noting, in words highly pertinent here, the difference between appeal in a unitary jurisdiction and collateral attack on federal habeas corpus.

> "Before a federal court may overturn a conviction resulting from a state trial in which this instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." *Id.*, at 146.

Naughten then goes on to consider the challenged instruction in the context of the entire trial. This is the full quote from which the phrase in question is lifted:

> "But the trial court gave, not once but twice, explicit instructions affirming the presumption of innocence and declaring the obligation of the State to prove guilt beyond a reasonable doubt. The Court of Appeals, recognizing that these other instructions had been given, nevertheless declared that 'there was no instruction so specifically directed to that under attack as can be said to have effected a cure.' 476 F. 2d, at 847. But we believe this analysis puts the cart before the horse; the question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Id.*, at 147.

The *Naughten* Court thus conceded that the instruction was "ailing." Viewed in isolation, it might lead the jury to a conclusion contrary to the defendant's federal right to proof beyond a reasonable doubt under *In re Winship*, 397 U. S. 358 (1970). Due process was not violated, however, because in the context of the entire trial it was unlikely that the jury would have interpreted the instructions as a whole that way. See *Naughten*, at 149; see also *Boyde* v. *California*, 108 L. Ed. 2d 316, 329, 110 S. Ct. 1190, 1198 (1990).

Before any discussion about an infection spreading to the entire trial is in order, there must first *be* an infection. That is, there must be some specifically identified *federal* right which is infringed. In *Naughten* it was the *Winship* right to make the prosecution carry its burden of proof. In *Boyde* it was the federal right to have a capital jury consider whatever character evidence defendant proffers. See *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality). In *Burgett*, *supra*, it was the *Gideon* right to counsel. In *Lisenba*, *Spencer*, and the present case there is only the "general 'fairness' approach," which has never been sufficient to second-guess the state courts on mere evidentiary matters otherwise entrusted to state law.

D. Court of Appeals Cases.

The Court of Appeals cited three cases for the proposition that admission of supposedly prejudicial evidence in a state trial constitutes a federal constitutional violation. All three predate *Teague*; all three disregard the limitations of federal jurisdiction; all three are wrongly decided. More importantly, however, these cases are *not* binding authority on the state courts.

The first case is *Bisaccia* v. *Attorney General*, 623 F. 2d 307 (CA3 1980). A co-conspirator's guilty plea had been introduced as evidence. The New Jersey Supreme Court rejected Bisaccia's Confrontation Clause argument on the ground that cross-examination was available. *Id.*, at 308-309.

On habeas corpus, Bisaccia made the additional claim that use of the guilty plea was due process violation. The Third Circuit began with a dubious analysis of the exhaustion requirement. *Id.*, at 309-312. It then proceeded to the merits.

The *Bisaccia* majority first acknowledged the "well-established principle that evidentiary errors of state courts are not considered to be of constitutional proportion, cognizable in federal habeas corpus proceedings, unless the error deprives a defendant of fundamental fairness in his criminal trial." *Id.*, at 312, citing *Donnelly* v. *De Christoforo*, 416 U. S. 637, 642-643 (1974). Having stated this principle, the majority proceeded to ignore it.

The majority first quoted at length from a 1949 federal case on ordinary evidence law. It then decided that because the rule was based on "fairness" any state action following a different rule "challenges our concept of due process." 623 F. 2d, at 312-313. The majority cited in support two Seventh Circuit cases. *Id.*, at 313. The Supreme Court's statement in *Spencer* v. *Texas*, see *supra* p. 20, that a "general 'fairness' approach" does *not* permit the imposition of federal practice on the states, is not mentioned.

Chief Justice Sitz recognized the majority's error. He concurred in the result based on what he saw as a violation of a specific provision of the Bill of Rights: the Confrontation Clause. *Id.*, at 315.

Osborne v. *Wainwright*, 720 F. 2d 1237 (CA11 1983) went a step further and turned controlling Supreme Court authority on its head. The claim was that gruesome photographs were unduly prejudicial, *id.*, at 1238, and Lisenba's rattlesnakes formed the obvious precedent. See *supra* p. 19. The *Osborne* Court read *Lisenba* as considering but rejecting Lisenba's claim that the evidence was unduly prejudicial *in his case*. 720 F. 2d, at 1238, n. 1. As we described earlier, the *Lisenba* holding is not so narrow. *Lisenba* categorically rejected the entire notion that the shocking nature of relevant evidence could *ever* "for that reason alone, render its reception a violation of due process." *Lisenba* v. *California*, 314 U. S. 219, 229 (1941).

The last and worst of the group is *Dudley* v. *Duckworth*, 854 F. 2d 967 (CA7 1988). The *Dudley* majority makes this incredible statement, *id.*, at 970 (emphasis added):

> "As the petitioner recognizes, the admissibility of evidence is generally a matter of state law. [Citations.] A writ of habeas corpus should issue, however, when an erroneous evidentiary ruling 'is of such magnitude that the result is a denial of fundamental fairness.' [Citations.] In determining whether a writ should issue, the court must determine 'whether the probative value of the evidence outweighs the prejudice to the accused.' [Citations.][6]
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> [6] *This standard is parallel to the standard of review in a direct appeal.* [Citations.]"

The citations in this passage are all circuit cases. Without citing a single Supreme Court precedent, *Dudley* pays mere lip service to the difference between habeas and direct review and then proceeds to apply exactly the same standard as it would apply to a direct appeal from a *federal* conviction.

And what was the egregious, fundamental error that supposedly reduced Dudley's trial to a travesty of justice? To explain why he was nervous, a witness revealed that he had received anonymous threats. *Id.*, at 969. The state supreme court had held this proper, and the federal district judge found "it was a very small incident in a fairly lengthy proceeding." *Id.*, at 970. Yet the federal appellate court found a violation of the Fourteenth Amendment. *Id.*, at 972.

Why do we even *have* state appellate courts? If those courts cannot be trusted to finally decide mundane evidentiary questions such as this one, we might as well shut them down and remove all criminal appeals directly to the federal circuits.

Is "due process" a legal amoeba? Can it change its shape at will to reach out and absorb any question of law on which a federal court disagrees with a state court? The precedents of this Court are uniformly to the contrary. "Fundamental fairness" is violated only in the case of truly egregious abuses such as mob-dominated trials and knowing use of perjured testimony. See *Rose* v. *Lundy*, 455 U. S. 509, 543-544, n. 8 (1982) (Stevens, J. dissenting).

Federal habeas corpus exists to protect the rights of the individual against the state. But the law-abiding people of the state have rights, too. They have the right to execute their criminal judgments absent a valid basis for federal interference. See *Demosthenes* v. *Baal*, 109 L. Ed. 2d 762, 769, 110 S. Ct. 2223, 2226 (1990). The three cases discussed above demonstrate that the people's rights are being violated with shocking frequency.

The judgment in the present case could be reversed with a single statement that the supposed "error," if it is error at all, is not "fundamental" enough to rise to the level of a due process violation. Experience demonstrates, however, that such a vague standard is not sufficient to hold the line on overzealous interference with state proceedings. Stronger medicine is needed. That medicine, amicus submits, is *Teague* v. *Lane*.

III. Every rule is "new," for the purpose of *Teague* v. *Lane*, until it is adopted by the Supreme Court.

In *Teague* v. *Lane*, 489 U. S. 288 (1989) (plurality), this Court established that, with rare exceptions not applicable here, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Id.* at 310; *Penry* v. *Lynaugh*, 109 S. Ct. 2934, 2944, 106 L. Ed. 2d 256, 274 (1989).

Announced by whom? The Court's treatment of Teague's claim leaves no doubt, if indeed there had been any, that a rule is "new" when it is announced by the Supreme Court, no matter how long ago lower courts may have accepted the argument.

Teague's contention was "that the Sixth Amendment's fair cross section requirement applies to the petit jury." *Id.*, at 299. This was hardly a novel argument. It had been accepted by the California Supreme Court over a decade earlier, albeit under a cognate provision of the state constitution. *People* v. *Wheeler*, 22 Cal.3d 258, 276-277, 583 P.2d 748 (1978). Two federal circuits had upheld claims similar to Teague's. *Booker* v. *Jabe*, 775 F. 2d 762, 767-771 (CA6 1985), *vacated sub. nom. Michigan* v. *Booker*, 478 U.S. 1001 (1986), *opinion reinstated*, 801 F. 2d 871 (1986), *cert. denied*, 479 U.S. 1046 (1987); *McCray* v. *Abrams*, 750 F. 2d 1113, 1130-1131 (CA2 1984), *vacated sub. nom. Abrams* v. *McCray*, 478 U.S. 1001 (1986); *Roman* v. *Abrams*, 822 F. 2d 214, 225 (CA2 1987) (reaffirming *McCray*).

These lower court authorities had been briefed to the *Teague* Court, see Brief for the Lawyers' Committee for Civil Rights Under Law as Amicus Curiae 13, but they made no difference to the Court's analysis. Announcing that "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final," 489 U. S., at 301 (italics in original), the Court looked only at its *own* precedents in making that determination. *Ibid.*

If *Booker* v. *Jabe* and *McCray* v. *Abrams* did not save the rule Teague sought from classification as a "new rule," then

what is the effect of the three circuit court cases relied on by the Court of Appeals in the present case? The answer is the same; they have no effect. That is as it should be.

The Supreme Court is unique among federal courts. It is the only federal court with direct appellate jurisdiction to review state judgments. 28 U. S. C. § 1257. "[L]ower federal courts possess no power whatever to sit in direct review of state court decisions." *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Eng'rs*, 398 U. S. 281, 296 (1970). State courts therefore have no obligation under the doctrine of stare decisis to follow precedents established by the lower federal courts. See 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.402[1] at 23 (2d ed. 1988).

The basic question under *Teague* is whether, "[f]rom the point of view of a state court considering petitioner's claim at the time his conviction became final," *Sawyer* v. *Smith*, 111 L. Ed. 2d 193, 208, 110 S. Ct. 2822, 2828 (1990), prior decisions "compel the rule that [petitioner] seeks." *Id.*, at 207, S. Ct., at 2828, quoting *Saffle* v. *Parks*, 108 L. Ed. 2d 415, 426, 110 S. Ct. 1257, 1261 (1990). A decision by a court of coordinate jurisdiction which is not binding precedent cannot compel a result which is not already compelled by the Supreme Court precedent itself. Quite the contrary, *Butler* v. *McKellar*, 108 L. Ed. 2d 347, 356, 110 S. Ct. 1212, 1217-1218 (1990) noted that disagreement among lower courts, both state and federal, was a strong indication that the new rule was *not* dictated by the earlier Supreme Court precedent.

The conclusion follows that the decision of whether a rule is "new" under *Teague* must be made by looking solely to decisions of the Supreme Court. Opinions from the lower federal courts, including the court hearing the habeas case, cannot dictate the result in a state court and hence cannot exempt the rule from the proscription of *Teague*. The new rule principle permits a state court to disagree in good faith with a lower federal court on an unsettled question of federal law without having its judgment set aside on habeas corpus. See *Butler*, *supra*, 108 L. Ed. 2d, at 356, 110 S. Ct., at 1217.

When the decision of the California Court of Appeals in this case became final, there was no precedent binding on it which compelled the conclusion that either the evidence or the instruction violated the Fourteenth Amendment. Both exceptions to the *Teague* rule, see 489 U. S., at 311-313, are clearly inapplicable. Estelle's custody of McGuire pursuant to an affirmed judgment of a court of competent jurisdiction is therefore not "in violation of the Constitution or laws or treaties of the United States" within the meaning of 28 U. S. C. § 2254.

CONCLUSION

The decision of the Court of Appeals should be reversed, and the decision of the District Court denying habeas corpus should be reinstated.

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Respectfully submitted,

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